

No. 89-1306

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSTRUCTION ENGINEERS, INC.,
ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, ARKANSAS CHAPTER, MICHAEL
SUTTERFIELD AND CATHERINE N. RUSHING,

Petitioners

v.

THE CONWAY CORPORATION,
JIM BREWER AND BENNIE J. MCCOY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

RESPONDENTS' JOINT BRIEF IN RESPONSE
TO PETITION FOR WRIT OF CERTIORARI

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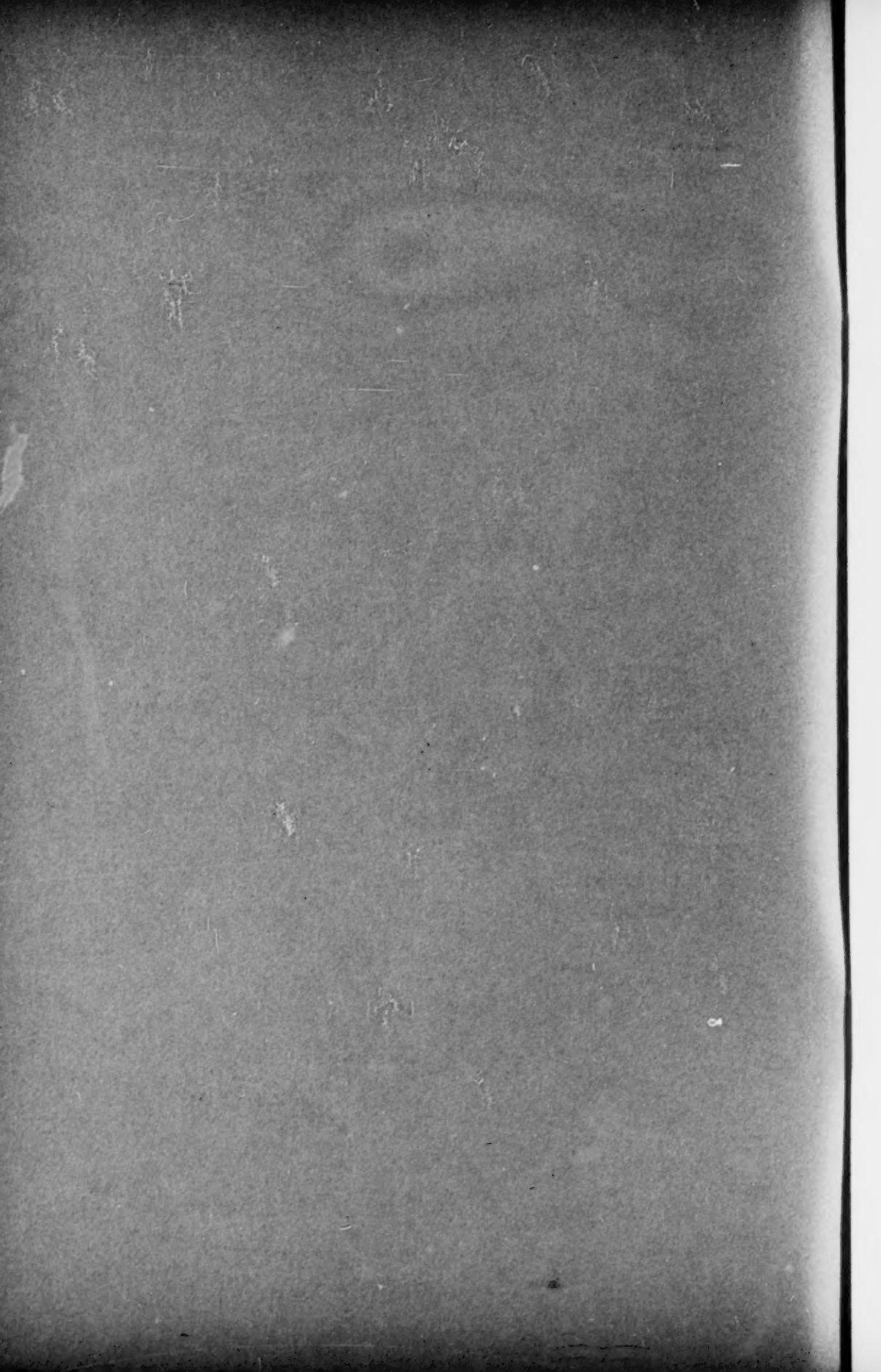


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STATEMENT OF THE CASE

Petitioner Construction Engineers, Inc. ("CEI") initiated the litigation from which this Petition arises in 1986 in an effort to be instated in a public works contract let by public bid by respondent the Conway Corporation, a non-profit corporation chartered by the City of Conway, Arkansas to own and operate public utilities within the City. CEI also sought, alternatively, to recover damages for the profit that it allegedly would have earned on the contract. The Conway Corporation had rejected CEI's low bid for the contract for cause and awarded the contract to the second low bidder. The trial court, the Pulaski County, Arkansas Chancery Court, awarded CEI judgment against those defendants who are respondents to this Petition. This Petition is in response to the reversal of that judgment by the Arkansas Supreme Court.

The petition is predicated on the Arkansas Supreme Court's alleged reliance on proffered testimony in support of its decision to reverse the judgment. Although not mentioned in the Petition, much of the evidence received at the trial level was presented before a special master appointed to determine CEI's claims for preliminary injunctive relief. The special master entered proposed findings that the preliminary injunctive relief should not issue because CEI had no probability of success on the merits of its claim, because the Conway Corporation had a reasonable basis for the rejection of

CEI's low bid for the public works contract, and because all defendants, including the respondents herein, had acted in good faith with regard to the rejection of CEI's bid.

Instead of accepting or rejecting the special master's findings as required under Arkansas law, the chancery court accelerated the hearing on permanent injunctive relief and heard evidence on that issue. Respondent McCoy was excused from that hearing. At the conclusion of the hearing, the chancery court entered findings of fact and conclusions of law finding, among other things, that the respondents herein, including McCoy, were liable in money damages to CEI. The chancery court then set for hearing the amount of money damages.

The respondents herein appealed the judgment of the Pulaski County, Arkansas Chancery Court to the Arkansas Supreme Court. The points of error presented to the Arkansas Supreme Court included, among others, that the chancery court erred in refusing to adopt the proposed findings of the special master and that the chancery court's findings were clearly erroneous. After reviewing the record of evidence before the special master and the chancery court, the Arkansas Supreme Court reversed and dismissed the judgment of the chancery court on those grounds. In essence, this petition is predicated on the sufficiency of the evidence to support the decision of the Arkansas Supreme Court.

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SUMMARY OF ARGUMENT

The opinion of the Arkansas Supreme Court from which this writ is sought did not reach or decide any question of federal law. The opinion reversed the trial court's judgment against the respondents and

dismissed the action on the grounds that the findings of the trial court were clearly erroneous. The opinion of the Arkansas Supreme Court is supported by the evidentiary record and, as expressly stated by the court, was in no way based on proffered testimony.

ARGUMENT

I. THE PETITION STATES NO GROUNDS WHICH WARRANT A REVIEW ON WRIT OF CERTIORARI

Rule 17 of the Rules of the Supreme Court provides that the discretionary writ of certiorari will only be granted when "special and important" reasons are shown in support of the petition. Rule 17 also provides illustrations of reasons that are "special and important":

...

(b) when a state court of last resort has decided a federal question in a way to conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) when a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has

decided a federal question in a way to conflict with applicable decisions of this Court.

The Petition is predicated on no such "special and important" reasons, and the petitioner does not even attempt to state "special and important" reasons for which the Petition should be granted.

Moreover, the petitioners have not shown that the Arkansas Supreme Court decided any question of federal law. *See also* 28 U.S.C. §1257(a). The petitioners argue that the court's opinion reversing the trial court was wholly based on proffered evidence for which the petitioners were denied the right of cross-examination. The Petition rests on one ambiguous statement in a footnote to the court's original opinion. (Petition at A-20.) In response to the entry of the original petition, the petitioners filed motions for reconsideration, which likewise alleged that the court's opinion was wholly based on proffered evidence. The Arkansas Supreme Court thereupon clarified the offending footnote by indicating that the opinion was "based on the evidence considered by the master and the chancellor."¹ (Petition at A-9.) The Arkansas Supreme Court never determined whether due process under

¹It is noteworthy that since the Arkansas Supreme Court expressly stated in its substituted opinion that no proffered testimony was considered (Petition at A-9 n.2), the petitioners must maintain that the court was academically dishonest in its substituted opinion in order to logically maintain that the court did in fact rely on proffered testimony.

Amendment XIV to the United States Constitution precluded an appellate court reviewing a trial court's findings *de novo* from reviewing proffered testimony. The substituted opinion from which this writ is sought was limited to the sufficiency under Arkansas law of the evidentiary record in support of the trial court's judgment and neither decided nor implicated any question of federal law.² (Petition at A-11 to A-12.)

II. THE PETITION IS PREDICATED ON
THE FACTUAL FINDINGS OF THE
ARKANSAS SUPREME COURT AND
THE INFERIOR PULASKI COUNTY,
ARKANSAS CHANCERY COURT.

The Arkansas Supreme Court reversed the judgment of the chancery court because its findings were clearly erroneous and because the chancery court erroneously rejected the master's proposed findings. Under Ark. R. Civ. P. 53(e)(2), an Arkansas trial court "shall accept the master's findings of fact unless clearly erroneous." The chancery court in this action did not review the record of the proceedings before the special master, but instead accelerated the hearing on permanent injunctive relief and entered findings of fact completely inconsistent with the findings of the

²The petitioners have not cited a single federal case discussing the requirements of due process for the *de novo* review of a trial court's findings of fact by a state appellate court. The petitioners have clearly not shown that the opinion from which this writ is sought conflicts in any way with the decisions of another court.

special master. The Arkansas Supreme Court's opinion was entered upon a review of the entire record of evidence, including evidence from the proceedings before the special master and before the chancery court. (Petition at A-9 n.2.)

The petitioners argue that no evidence in the record supports the Arkansas Supreme Court's decision and therefore that the court must have relied on proffered evidence in reaching its decision. The petitioners' argument is affirmatively misleading and ignores the evidence in the record. In their statement of the case, for example, the petitioners cite several factual findings of the Arkansas Supreme Court that are allegedly either supported only by proffered testimony or are unsupported by any portion of the record, including proffered testimony. The record squarely contradicts the petitioners' argument.

First, the petitioners claim that the Arkansas Supreme Court's description of a previous construction contract between the Conway Corporation and CEI as a small subcontract was incorrect and supported only by proffered testimony. (Petition at xii.) However, during the hearing before the special master, Mr. James Brewer, the general manager of the Conway Corporation, testified that the previous project performed by CEI was a small project, costing less than \$35,000, and that the Conway Corporation furnished all materials to CEI, thereby performing what is usually a contractor's role.

(Respondents' Appendix at A15-A16.) From this testimony, the court could clearly conclude, and the respondents so argued, that CEI was merely acting as a small subcontractor on the previous project.

Second, the petitioners claim that neither the record nor the proffers of evidence support the court's finding that certain notes which allegedly impeached Mr. Bennie McCoy's testimony were written by Mr. McCoy for his own use and preparation for a deposition. (Petition at xii-xiii.) The petitioners' contention is clearly wrong. When cross-examined about the notes at the hearing before the special master, Mr. McCoy testified: "It was a log that I prepared to organize my files and develop some chronology prior to your taking of my deposition." (Respondents' Appendix at A11-A12.)

Third, the petitioners maintain that proffered evidence provides the only basis for the court's statement that Mr. James Brewer's concern about CEI's ability to perform the public works contract was founded upon information received from a local school superintendent and local newspapers and concerned problems with plumbing, cabinet work and windows in a school building constructed by CEI. (Petition at xiii.) However, the testimony elicited from Mr. Brewer before the special master clearly shows that his sources included the school superintendent and the local newspapers. (Respondents' Appendix at A13, A18.) On cross-examination before the special master, Steve Smith, the President of CEI,

admitted problems with the plumbing, windows and cabinet work in the school building and confirmed that the local newspapers had written about those problems. (Respondents' Appendix at A20-A29.)

Fourth, petitioners also argue that there was no basis for the Arkansas Supreme Court's finding that after listening to information and recommendations by James Brewer, the Board of Directors of the Conway Corporation was unanimous in its decision to reject CEI's bid for the contract. (Petition at xiv.) However, the unanimous vote following Mr. Brewer's presentation is in the record and in the minutes from the board meeting, which were received into evidence. (Respondents' Appendix at A16-A19, A30-33.)

Likewise, in their argument supporting the grounds for the issuance of a writ of certiorari, the petitioners state that the evidence of poor workmanship on previous projects, which formed, in part, the basis of the Conway Corporation's rejection of its bid for the public works contract, is absent from the record. (Petition at 6.) This is clearly untrue. The problems with CEI's previous projects were stated repeatedly throughout the record. In fact, the majority of their problems were testified to by CEI's president, Mr. Steve Smith. These involved a wide variety of complications in at least two projects, including CEI's failure to use specified materials in the construction of a school (Respondents' Appendix at A21), improper plumbing in

the school (Respondents' Appendix at A23), improperly placed insulation in the school (Respondents' Appendix at A25-A26), improperly installed ceiling tiles in the school (Respondents' Appendix at A25-A27), failure to pay subcontractors timely (Respondents' Appendix at A28), failure to meet milestones on contracts for the construction of a sewage treatment facility (Respondents' Appendix at A11) and a "paper war" with the consulting engineers on the sewer project (Respondents' Appendix at A10-A11.).

In addition, the petitioners specifically argue that the testimony of the architect for the previous school construction project contradicts any inference of poor workmanship by CEI. (Petition at 6.) The school architect testified during the hearing before the special master that CEI did not properly manage its subcontractors (Respondents' Appendix at A5-A6), that the project was far from complete at the scheduled date of completion (Respondents' Appendix at A8-A9), and that overall it was his "worst experience" with a general contractor (Respondents' Appendix at A7).

The remainder of the Petition consists of rambling, inconsistent allegations that are not only irrelevant to the asserted grounds for issuance of certiorari, but are without any factual basis. The Arkansas Supreme Court's reversal of the judgment entered by the chancellor is clearly supported by the record. Because the Arkansas Supreme Court did not

rely on the proffers of proof, determining whether such reliance offends due process of law would require an advisory opinion of this Court.

III. THE PETITION LACKS MERIT UNDER THE LAWS OF THE STATE OF ARKANSAS AND THE DECISIONS OF THIS COURT

Petitioners cite nine decisions from the federal courts in support of their argument that the Arkansas Supreme Court's *de novo* review of the record on appeal from the chancery court denied it due process of law. None of the cases cited by petitioners in support of their argument involve an appellate court's review of the evidentiary record supporting a chancery court's findings of fact. The Arkansas Supreme Court has always recognized as a tenet of equity jurisprudence that the record from chancery courts is subject to *de novo* review on appeal.³ See *Woodruff v. Core*, 23 Ark. 341, 346 (1861).

Additionally, the Petition is without merit under the holdings of the cited cases. See, e.g., *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

³Under Arkansas chancery practice and procedure, all trials are to the chancellor and no right of jury trial exists in that court.

In both *Addington* and *Armstrong*, a state court had determined a case on grounds that clearly involved the right to due process or law. In *Addington*, the question involved the standard of proof required by due process to civilly commit an individual, thereby depriving him of his liberty. 441 U.S. at 423-26. Obviously, the resolution of this question would be of major importance in every state. In *Armstrong*, the Court was presented with the failure to give adequate notice of a hearing which it held to be an obvious violation of "the most rudimentary demands of due process of law." 380 U.S. at 550. This issue would also be of significance to similar situations in every state. Unlike *Addington* and *Armstrong*, the case at bar does not involve a question of national importance, but merely involves the adequacy of the evidentiary support for the decision of the Arkansas Supreme Court.

Additionally, the uniqueness of this particular chancery case makes it inappropriate for review by writ of certiorari. The parties understood that the hearing before the chancery court was to be limited to the issue of permanent injunctive relief. (Petition at A-9, n.2.) However, at the conclusion of the hearing, the chancellor summarily rejected the proposed findings of the special master, entered completely inconsistent findings, and found liability for monetary damages against the respondents, including Mr. McCoy who had been excused from the hearing, without hearing evidence on the issue of liability for damages. The chancellor's

abrupt action necessitated the proffers of evidence to which the petitioners object. Clearly, the proffers of evidence was the result of an unusual chain of events which does not often occur. As stated by Chief Justice Taft, it is very important that the Court "be consistent in not granting the Writ of Certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties. . . ." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 442, 67 L.Ed.2d 12 (1923). The present case does not command such public importance.



**In the Chancery Court of Pulaski County, Arkansas
First Division**

Construction Engineers, Inc.

Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh
Construction Co., Jim Brewer, Bennie J.
McCoy, John Doe I, John Doe II, and
Defendants, Larry Graddy, Frank Robins, III,
Lou Gardy, Bill Pate, Bob Clifton and
Leo Crafton, III, as Members of the Board of
Directors of The Conway Corporation

Defendants

MASTER'S FINDINGS AND CONCLUSIONS

On March 24, 1987, Plaintiff, Construction Engineers, Inc.'s petition for a restraining temporary order and preliminary injunction came on for hearing at the appointed time; Plaintiff, Construction Engineers, Inc., appearing by David A. Orsini, its attorney, and Stephen and Danielle Smith, as corporate representatives; Bennie McCoy, appearing in person and by his attorneys, James M. Moody and Roger Rowe; The Conway Corporation, M. D. Limbaugh Construction Company, Jim Brewer, Larry Graddy, Frank Robbins, III, Lou Gardy, Bill Pate, Bob Clifton, and Leo Crafton, III, appearing through their attorneys, Michael G. Thompson and Michael G. Smith, and through Jim

Brewer and Michael Limbaugh. Special Master John Plegge, appointed by Order of this Court, heard the evidence and arguments of counsel, and recommends that the Court adopt the following findings of fact and conclusions of law:

1. The test for issuing a preliminary injunction involves consideration of four factors: (1) the threat of irreparable harm to the movants; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) probability that movant will succeed on the merits; and, (4) public interest.

2. The Plaintiff has failed to meet its burden of proof that it will suffer irreparable harm if an injunction is not issued. Any harm which the Plaintiff alleges it has suffered may be remedied by an award of monetary damages. The evidence presented at trial is insufficient to show the irreparable harm to the plaintiff which necessarily must be shown for the issuance of a preliminary injunction.

3. The harm which The Conway Corporation and the M. D. Limbaugh Construction Company will suffer if an injunction was issued far outweighs any harm to be suffered by Plaintiff if the injunction is not issued. The harm to be suffered by the Defendants herein is potentially much greater than that alleged by the Plaintiff. The evidence and testimony adequately support this

finding.

4. Plaintiff has not shown a probability of success on the merits of its claim. *Ark. Stat. Ann.* §14-612 applies and gives The Conway Corporation discretion in awarding bids. Jim Brewer, Bennie McCoy, and the Board of Directors of The Conway Corporation acted in good faith and had a reasonable and rational basis for determining that the second low bidder was the lowest *responsible* bidder. Further, the Board had discretion and acted in good faith in determining in its opinion that it would serve the best interests of the taxing unit to award the contract to the Limbaugh Company.

5. The public interest would be adversely affected by the issuance of the requested injunction. The City of Conway has had to resort to voluntary rationing of water in previous Summers when water usage was highest. Now, because of the construction, the maximum capacity of the water system has been reduced substantially. If construction were halted at this time, there would be a serious danger that Conway would experience severe water shortages in the coming Summer. The harm to the public which would result from the issuance of an injunction halting the project outweighs any private harm to the Plaintiff which may result from not issuing it. Furthermore, the harm to the taxpayers of Conway which would result from issuing the injunction far outweighs the harm Plaintiff contends they would suffer if the contract is allowed to proceed.

6. The Plaintiff has waived its right to seek an injunction by failing to seek a timely hearing on the issue. The contract was let and Construction Engineers notified that its bid had been rejected on July 7, 1986. Suit was not filed to enjoin the construction from proceeding until August 20, 1986. After suit was filed, Plaintiff did not seek a hearing on the injunction issue until late October, 1986. At that time, the Honorable Judith Rogers (in whose Court the action was then pending) notified the Plaintiff that she could not hear the case until after January 1, 1987. Judge Rogers offered to appoint a Special Master if the Plaintiff so requested, but the Plaintiff did not make such a request. Judge Rogers also notified Plaintiff that if it had sought a hearing when suit was filed, it could have received an earlier hearing. Plaintiff elected to wait until Judge Rogers could hear the case personally, and a setting of March 19, 1987, was made. Judge Rogers was not able to hear the case on March 19 due to illness, and the case was transferred to this division, whereupon a Special Master was appointed. At the time of the hearing, the contract was already 17% complete. It is obvious that the pre-litigation *status quo* cannot be maintained nor restored by the issuance of an injunction at this late date.

The foregoing contains my findings of fact and conclusions of law and is recommended to the Court for adoption as the Order of this Court on this the 14th day of April, 1987.

JOHN B. PLEGGE
Special Master

TESTIMONY OF DAN STOWERS IN THE
PROCEEDINGS BEFORE THE SPECIAL MASTER

Dan Stowers, having been previously duly sworn on oath, testified as follows: . . .

A. McCoy did call me and I responded—

Q. What did he ask you? What did he say?

A. He asked—he said that he was doing some follow-up work, which we normally do on our contractors when they bid our projects, and he needed a reference for CEI. And I kind of chuckled and we talked a little bit and I told him that CEI had not performed well on Florence Mattison school in Conway. We had had several problems and he didn't really want to hear all of that, he didn't have time to do that. But basically we had four or five subcontractors that had not performed well and that became a great issue in our contract.

But I cautioned him a little bit because, on the surface, CEI—the owners, Steve and Danielle, are very, very qualified. As a matter of fact, I'm amazed that

they would locate in Arkansas. They both have a Master's degree in engineering, they have a contractors' license, they have the ability to bond, and I think I used the term that they were both smarter than a tree full of apples. My experience had been that, one thing, even though you have a contractor's license, it does not indicate integrity. A contractor receives a fee for being a general contractor. He signs up to do and perform a certain task for an owner who does not have the people available to him for construction. And it seemed like to me that CEI took the attitude that they had signed contracts to sublet their contracts. They probably did maybe 75 to 80 percent of their work under subcontracts, leaving on [sic] a very minor portion of the construction work to their disposal. And any time that they had a problem with a subcontractor, they simply side-stepped the issue, simply turned that issue back to the owner. We are not accustomed to that here in Arkansas.

If you have a stable contractor, most general contractors assume responsibility for their subcontractors, and a Nabholtz or a Starkey, which are both contractors located in the City of Conway, would assume the responsibility and kind of take the burden on themselves. And that's a part of their fee, to isolate the owner from the problems of subcontracting. Other than that, I didn't have anything else to add.

Q. Did you make a recommendation, though, to him regarding—

A. No, I really didn't, inasmuch as I said that things could have changed, CEI could have bought additional equipment, and their performance could have changed. And I said he needed to investigate that matter.

Q. But you didn't recommend them based on your previous experience.

A. (No response.)

Q. Did you make a statement to Mr. McCoy that this experience with the Florence Mattison School and CEI was the worst experience you ever had in your life with a contractor?

A. I think I said that it was not one of my most pleasant experiences, yes, sir. . . .

Cross-Examination

Q. Mr. Stowers, do you remember when the substantial completion date was for the school?

A. The substantial completion was issued in two portions: one for a very minor section that was to house a specified type of child and learning disability type student, and another one for the major portion of the work. And I believe that that was later turned over to litigation. I'm not certain that that second one was ever

signed.

Q. Do you remember when substantial completion was set in the project, when it was supposed to be? Excuse me, do you remember when the completion date was supposed to be for the project?

A. The completion was supposed to have been in November, around November. I looked at the dates. The contract was \$1,467,000, the work order was issued on 9/2 of '80, which 365 days was the contract limit. I did not go into my files and investigate when the—

Q. Substantial completion date was a year later, September 2 of '81?

A. Correct.

Q. Two buildings, Building A and Building B?

A. (Witness nods head in response.)

Q. Wasn't one building accepted in August and one building accepted on September 2?

A. With a substantial amount of work to be completed.

Q. But substantial completion was accepted on those two dates, was it not?

A. That was someone else's testimony. I would not agree to that.

Q. What if it was a statement—

A. Let me—you are proper in your term of substantially complete, inasmuch as the owner had to take over the building because of the children coming into the school district in September. There was, again, an incredible amount of work to be completed, but the owner had to take the project . . .

TESTIMONY OF BENNIE J. McCOY
IN PROCEEDINGS BEFORE THE SPECIAL MASTER

Bennie McCoy, having been previously duly sworn on oath, testified as follows:

Q. Would you state your name for the record?

A. Bennie J. McCoy.

Q. By whom are you employed, Mr. McCoy?

A. Crist Engineers, Incorporated, Little Rock.

Q. What is your position?

A. I'm President of the firm.

Q. How long have you been with Crist Engineers?

A. It will be 30 years this coming August.

Q. Your firm has an engineering contract for the Gleason project that's under litigation today?

A. Yes, sir.

Q. You've been sitting in the courtroom thus far, have you not?

A. I've been here all day, yes, sir.

Q. And you've heard both this current project being talked about and the 1984 project being talked about. . . .

Q. What did Mr. Lloyd tell you, then, about the nature of the project or the work? What information did you gain from him that was valuable to you in what you were doing?

A. I think that's the first time the remark was

made about a paper war between the Mehlburger firm and CEI.

Q. Did he tell you there was a paper war?

A. Did he tell me that?

Q. Yes.

A. Yes.

Q. Did he say there was a paper war or there perhaps might be one? What did he say?

A. My recollection is that he said that—the phraseology “paper war,” those were his words. He said, “We’re in a paper war,” or “It looks like we’re going into a paper war,” or “There is a paper war.”

Q. What else?

A. That they had missed, at that point in time, I think he mentioned several milestones in their production. . . .

Q. Look at these notes here. That’s your handwriting, is it not?

A. These are absolutely my notes, Mr. Orsini.

Q. They are the recollection you chose to write at the time with regard to this Larry Lloyd/Fred Oswald visit.

A. Yes.

Q. Look at the next page of the notes. Do you see those?

A. Yes.

Q. Those having to do with conversations you had with Bill Graham?

A. Yes, sir.

Q. And reflect the results of your investigation there.

A. Yes.

Q. And I also notice the very first page, Paragraph 5.

A. Yes.

Q. What is this first page? It's typewritten. What does it purport to be?

A. It was a log that I prepared to organize my

thoughts and develop some chronology prior to your taking of my deposition.

TESTIMONY OF JIM BREWER
IN PROCEEDINGS BEFORE THE SPECIAL MASTER

Jim Brewer, having been previously duly sworn on oath, testified as follows: . . .

Q. You had some concerns, did you not, Mr. Brewer?

A. Yes.

Q. Do you know if anyone else on the board of The Conway Corporation had any concerns?

A. Oh, not really. I don't know.

Q. And what were your concerns based on?

A. The publicity surrounding the Mattison school project, the many conversations back through several years there with members of the school board; Carl Stewart, the superintendent. And then the incident of the school project, that had some bearing on it, too, Mr. Orsini. There's a couple of members of the City Council in Conway who had knowledge of that Morrilton project and expressed some concern about it.

Q. Let me limit my questions, Mr. Brewer, to the point in time of the conversation we're having, this very first conversation you're having with Roger Mills and McCoy.

A. I can't pinpoint a single conversation that I had with these people. I visit with them on a daily basis, Mr. Orsini. . . .

Q. Did you have any knowledge about Morrilton, the Morrilton project?

A. My knowledge was through an alderman there in Conway.

Q. At the point in time that you gave him the letter—I'm not sure you're answering me straightforward—did you give McCoy anything other than this letter, any other information about CEI to use?

A. I don't recall anything, Mr. Orsini. You might want to refresh my memory there on something.

Q. Did you intend for McCoy to rely on this letter?

A. Well, what do you mean by rely on that letter?

Q. You're giving this to him as part of his

investigation. Did you intend for him to rely on it or use it in the investigation in any way?

A. Well, this serves as a statement from the school superintendent, I presume, representing the owner on that project.

Q. Look at Page 39 of your deposition. Do you see Line 2 at the top?

A. Yes.

Q. The question was, "What was the purpose of giving the letter to McCoy.["] Do you see your answer, "To have for his file"?

A. To have for his file, yes, sir. . . .

Q. In the past experience with CEI, did they do good work, did they do bad work on their Conway Corporation Gleason?

A. That little project they did for us was acceptable, yes.

Q. You characterized it as a little project. The City supplied the materials—

A. Our contract with Steve was something less than \$35,000 and we consider that pretty small. A

project like that, Mr. Orsini, has a lot of risk factor in it, in that you've got to try to do it in a short time frame. And in that respect, similar to this project, but otherwise, it's not. As you've heard from testimony this morning from Steve, one of the real problems that contractors have in meeting time frames on projects is delivering materials. We took that risk out of that project completely by furnishing all the materials to the contractor. We took all of that responsibility. . . .

Q. And you are the General Manager?

A. Yes.

Q. How long had you been the General Manager of Conway Corporation?

A. Since 1965.

Q. And are part of your duties and responsibilities to make recommendations to the Board of Directors?

A. Yes, sir.

Q. But you don't sit as a Director on the Board; is that correct?

A. No, sir.

Q. Has Conway experienced water problems in the past few years?

A. Yes, sir. Conway is growing at a rather significant rate from, oh seven to ten percent a year, I guess, over the past several years. In 1985, the water demand went upward from '84 and we experienced a shortfall in capacity. In other words, the demands of the city for water exceeded the capacity of the plant to produce water. But by the cooperation of the people in the use of water in somewhat restricting usage, we made it through that summer. The same thing in '86.

Q. You had to ask the general public to voluntarily ration. Is that what you're saying?

A. Yes, curtailed usage, right.

Q. Based on your experience as a General Manager of Conway Corporation, do you see any problems this summer?

A. Yes. Our city has grown about another seven percent in the past year. The water usage has grown ten percent. If we don't have that plant on the line by the peak period of this summer, we will experience a shortfall of water in the neighborhood of 25 percent of need, which is very significant. We will have to ration water.

Q. Now, you had some concerns, you've already stated, with regard to CEI when you discovered that they had checked out the bidding documents; is that correct?

A. Yes, sir.

Q. What were those concerns based on?

A. They were based on our knowledge and understanding of the problems they had with coordinating work of subcontractors on the Mattison school project and some problems that seemed to be apparent with the Morrilton sewer project.

Q. Had you read newspaper articles?

A. Yes, sir, yes, sir. I read newspaper articles I'd discussed through the years there with members of the school board and the Superintendent of the school.

Q. Let me hand you a couple of documents and ask you if you can identify them. The first one is marked Defendant's Exhibit Number 3.

A. Yes, sir, I believe this is a proof of publication.

Q. Showing the advertisement for bids.

A. Yes, sir, on the waterworks improvement project, the Gleason project.

Q. And Defendant's Exhibit Number 4.

A. This appears to be copies of our board meeting of July 7, 1986, with attachments, yes, sir.

Q. And that is the board meeting where the contract was awarded to Limbaugh?

A. Yes, sir, that is the meeting where the board heard my recommendation and reviewed the pertinent information and authorized the manager to do certain things, including giving the contract to the second low bidder. . . .

Q. Did you ever talk to anybody prior to the award of the contract on July 9th? Did you ever talk with anybody up at the Morrilton sewer project?

A. No, sir.

Q. So whatever you heard about the Morrilton sewer project came from what source?

A. A couple of aldermen as I recall.

Q. There in the City of Conway?

A. Yes, sir. . . .

TESTIMONY OF STEVE SMITH
IN PROCEEDINGS BEFORE THE SPECIAL MASTER

Steve Smith, having been previously duly sworn on oath, testified as follows:

Q. Would you state your name for the record, please?

A. Steven Smith.

Q. Where you live, Mr. Smith?

A. I live in Russellville.

Q. By whom are you employed?

A. Construction Engineers, Incorporated.

Q. In what capacity?

A. I'm the President.

Q. Is your wife here in the courtroom today?

A. Yes.

Q. Is she also an officer?

A. Yes, she's Vice-President.

Q. Are you and she two of the owners of CEI?

A. Yes.

Q. You refer to your company as "CEI"?

A. We do. . . .

Q. And you had stated in your deposition, at Page 33, commencing at Line 8, "The cabinets were not constructed in accordance with the specifications. The materials used were not the materials specified in the drawers. I think that was—my best recollection that the way the drawers were constructed, they were constructed out of a laminated plywood and the specifications required that they be constructed out of solid stock material, and that was the reason they were holding the \$80,000." And that was your answer on that day. Did you say that?

A. Same answer today, they were constructed out of material the manufacturer thought was superior, he thought man-made material was superior to solid stock, he had a lot of reasons, the architects didn't agree.

Q. And that was CEI's failure, was it not?

A. If you deem that a failure.

Q. And the problems that arose in connection with the elementary school in Conway were the subject of many local newspaper articles in the community, were they not?

A. There were a few articles. I don't know if "many" is characteristic.

Q. But there were some articles in the community; is that right?

A. There were some articles in a local newspaper.

Q. Would you agree that this school and the problems involved with it were the subject of common knowledge in the community?

A. No.

Q. And would you disagree if your wife testified otherwise in her deposition? Would you disagree with her testimony if she testified that it was the subject of general knowledge and reputation in the community?

A. I never disagree with my wife.

Q. So you'd agree with me in that respect?

A. In that respect, I do.

Q. Were there also plumbing problems on the job where the pipes in the school were placed overhead and froze and burst and caused damages?

A. The pipes were run overhead, they froze and burst.

Q. And that was in the winter of 1981; correct?

A. Yes.

Q. And the school sustained several thousand dollars in damages due to the pipes freezing; isn't that true?

A. I don't know if that's true. There was damage to the building. My company repaired the damage that we were aware of at no cost to the owners, but I am not aware of any other damage.

Q. Let's refresh your memory. On Page 35 of your deposition, commencing at Line 16, and we're referring to this problem with the water:

"Q. How much damage did it cause?

"A: Dollarwise, I don't know. I would say thousands of dollars.

"Q. Several thousand?

"A. Several thousand, something like that, maybe \$5,000."

A. Your question was did I cause the school to spend that money, where my testimony referred to earlier in my deposition was that my company repaired that at no cost to the owner.

Q. My question was solely it cost \$5,000 in damages.

A. You said did I cause \$5,000 damage to the school, and I understood that to mean that they paid the 5,000. I'm sorry I didn't understand your question.

Q. The school sustained several thousand dollars in damage, did it not?

A. The building, not the school.

Q. The building did. Thank you. And that was the subject of articles in the local newspaper, was it not?

A. It could have been. I don't know.

Q. And there was also a problem with the windows in the school, were there not, where CEI did not install the proper safety glass?

A. There was a problem with the safety glass in the windows.

Q. And that was due to CEI's failure to follow specifications; isn't that true?

A. Yes. We had installed the glass in accordance with building codes and safety codes and it turned out that the specification was more stringent. And when the supplier installed them, we failed to recognize they didn't follow the specs instead of the code.

Q. And that was the subject of local newspaper articles in the Conway community, wasn't it?

A. No that I'm aware of.

Q. And there were instances where CEI improperly placed insulation in the school, were there not?

A. There were some areas of the ceiling that had some insulation missing.

Q. "Improperly placed," I believe, is the language used in your deposition.

A. I think that's fair, yes.

Q. And CEI also failed to properly install the ceiling tiles at the school, did it not?

A. No, I think they were properly installed.

Q. Well, let me refer you to your deposition again. On Page 38, commencing with Line 6:

"Q. Were there ceiling tiles that were the subject of complaints by the school district?

"A. I think that the specs require a hold-down clip to be installed in the T-grid and that the ceiling contractor had either not installed all of them or had done it in an improper manner or some such thing."

Is that your answer on that day?

A. Uh-huh, yes.

Q. And you are the contractor on the school.

A. I am the contractor.

Q. That is, CEI is.

A. CEI is or was.

Q. And these problems were all a subject of the local newspaper articles in Conway?

A. I don't want to leave it quite like that. You asked me if the ceiling tile was installed correctly and I thought I gave you a truthful answer both times. Are you saying I didn't do that?

Q. I'm moving on to the next question. These were the subject, all these problems, of the local newspaper articles?

A. I don't know about the newspaper articles, Mike.

Q. You don't know one way or the other.

A. You said there was a lot; I think there may have been some. I don't know specifically.

Q. As a result of these and other problems, the subcontractor filed a suit against CEI because CEI failed to pay it on the Conway school job; isn't that true?

A. Could you repeat the question?

Q. As a result of these and other problems that we've discussed here in the last few minutes, a subcontractor filed a lawsuit against CEI for failure to pay it on this contract; isn't that true?

A. Yes.

Q. And then CEI filed a Third-Party Complaint and brought the owner, the school district, into that litigation, didn't it?

A. Yes.

Q. And before the litigation was over, there were several parties involved in that litigation, several subcontractors and the owner and CEI; isn't that true?

A. That's true.

Q. And this was the subject of local newspaper articles in the community, was it not?

A. I think I already told you, Mike, about the newspapers. I don't know.

Q. This litigation involving this school that was built—commenced in 1980 was not finally settled until January of 1986, was it?

A. We worked out an agreement with the

school in 1982 for what would be required to settle up all the problems. One of the major subcontractors involved in that agreement entered bankruptcy in early 1983, and before we could sign all the agreements, the bankruptcy dragged on for years and years, we couldn't sign the agreements because the person that had agreed to it now had to defer to the bankruptcy court, and it just went on forever. So technically, the last paperwork that my attorneys attended to, I don't know when it was finished. But as far as the school was concerned, it was in 1982.

Q. But the school's attorney finally signed the Order of Dismissal, along with all the many other parties, and it was entered in January of 1986; isn't that true?

A. I don't know that to be true, Mike. It could very well be.

Q. Let me show you a document and see if you recognize that as the Order of Dismissal.

A. I've never seen that document, but I take your word for it.

Q. You know it was many years after the school started, the project started?

A. In 1982, we worked it out with the school. The bankruptcy dragged it on forever. . . .

MINUTES OF BOARD MEETING OF JULY 7, 1986

At a special meeting of the Board of Directors of the Conway Corporation on July 7, 1986, all members were present. Jim Brewer, Manager; Bill Hegeman, Manager of Finance & Accounting; and Bennie McCoy, President, Crist Engineers, Inc. were also present.

The purpose of this special meeting is to consider wages of hourly employees and alternatives concerning the water treatment plant project.

The Manager apprised the Board that the Arkansas Power & Light Company and the International Brotherhood of Electrical Workers had completed their negotiation efforts concerning wages. They agreed to a 3.75 percent increase in the wages of hourly employees. Historically, the results of this negotiation weighs heavily in the annual review of hourly employees and, in the absence of other significant criteria, the Manager recommended that this wage adjustment level be adopted by the Conway Corporation and the hourly employees of the Conway Corporation wages be adjusted upward by 3.75 percent. After some discussion in which it was pointed out that this would impact the cash flow of the Conway Corporation by \$56,463.68 per year as it upwardly adjusts the salaries of 78 employees, a motion was made by Luke Gordy and seconded by

Larry Graddy to accept the recommendation of the Manager that this level of adjustment be retroactive to the first pay period in June. This motion received unanimous approval.

The Manager reviewed the events to date concerning the construction of the water treatment facility and accompanying bond issue, pointing up the recent acceptance of bids on the project, discussed capabilities and experiences of bidders, and recommended that the project move forward into the construction phase. It was pointed out that if the plant is constructed as designed and the alternative pipeline Schedule 2-B is constructed, a shortfall of funds in the amount of approximately \$680,000.00 will exist. Two construction alternatives seem to be available. (1) Pipeline Schedule 2-A would reduce the fund need by \$147,000.00. Additionally, it is believed that elimination of the sludge siphon assembly from the project would reduce the project cost by approximately \$200,000.00. This assembly could be retrofitted later with an estimated 25 to 35 percent increase in the present cost.

Methods of covering the shortfall of funds include: (1) Another bond issue; (2) Using available reserve funds; and (3) Funding from anticipated cash flow surplus.

Information concerning the qualifications and experience of the two low bidders was reviewed. Mr.

McCoy reviewed a letter of July 3, 1986 in which he enclosed the resumes, financial references, experience records, etc. of the two low bidders on Schedule 1. A copy of that letter is attached to and hereby made a part of these minutes. Mr. Brewer read a letter from Mr. Carl Stuart, Superintendent of Conway schools, telling of his experiences with Construction Engineers, Inc. as the contractor constructing the Florence Mattison School. The Manager also told of a letter from Mr. John Echols, Friday, Eldredge & Clark Law Firm outlining the sources of funds available to fund this project. Copies of these letters are attached to and hereby made a part of these minutes.

After considerable discussion concerning this project, funding of the project, alternatives, and qualifications of the two low bidders on Schedule 1, the Manager made the following recommendation:

1. A contract for Schedule 1 be awarded to the second low bidder.
2. The Manager be authorized to negotiate a reduction in cost by eliminating the sludge siphon assembly after which a decision will be made to include or eliminate said system.
3. Contingent upon the decision identified in Paragraph 2, a selection of Schedule 2-A or 2-B will be made.

4. A contract be awarded to the low bidder on Schedule 2-A or 2-B.
5. The shortfall of funds be provided from a combination of reserve funds and anticipated cash flow surpluses.

After a rather lengthy discussion, a motion was made by Mr. Gordy and seconded by Mr. Clifton that the Board accept and approve the recommendation of the Manager. This motion received unanimous approval.

There being no further business requiring the attention of the Board at this time, the meeting was adjourned.

These minutes approved by the Board of Directors of the Conway Corporation on

_____.

FRANK E. ROBINS, III
President

LUKE GORDY
Secretary-Treasurer

CRIST ENGINEERS, INC.
Consulting Engineers
Little Rock, Arkansas 72204
July 3, 1986

Mr. James H. Brewer, General Manager
The Conway Corporation
P. O. Box 99
Conway, AR 72032

Re: Expansion of Gleason Water Plant,
Conway AR
(Bids as Received June 26, 1986)

Dear Mr. Brewer:

Enclosed please find a Certified Copy of the Bid Tabulation of all bids as received on Schedule 1 (Water Plant Expansion) and Schedule 2 (24-in. Transmission Line) on June 26 at 1:30 PM.

We are well pleased with the number of bids received; and consider that there was certainly an adequate amount of competition in the bidding. It is our opinion that the bids as received reflect a true evaluation of the worth of the project. We do not believe that any significant savings could be generated by rebidding the project. There is usually a stigma associated with rebidding work that is a detraction; and typically less bids are received than in the initial bidding.

Further remarks are on the basis of the individual Schedules of the work:

SCHEDULE 1 (Water Plant Expansion)

Low Bid	Construction Engineers Inc.	
	Russellville, AR	\$3,885,900

2nd Bid:	M. D. Limbaugh Const. Co.	
	Sikeston, MO	\$3,952,000

Enclosed you will find complete Resumes, financial references, experience records, etc. pertinent to both of the above construction firms.

I have contacted references as given by both of the above contractors. Following is a synopsis of remarks made by the references for each of the contractors:

Construction Engineers, Inc.

Tries hard to do a good job—quality of work usually good. One Reference reported lack of good superintendency on project. Work seems to go well when Steve Smith (Owner) is running job personally. Smith sometimes has inclination to try to “improve” on the plans. Good administratively, but office staff sometimes controversial. One Reference

stated that a "paper war" resulted when Smith failed to meet critical mileposts on project and time extension was requested.

Surety reported that Construction Engineers, Inc. was not extending bonding capacity to the limit if awarded this contract.

Architect for Conway school project several years ago stated Construction Engineers, Inc. was not responsible for the deficiencies of their Subcontractors; and expected the Owner and the Architect to deal with his Subcontractors directly. (This Architect stated that this was the worst experience he had ever had in this respect!)

M. D. Limbaugh Construction Co.

I talked to 5 references pertaining to Limbaugh. The consensus was overwhelmingly an *excellent report*. Firm is well experienced, well staffed with experienced personnel, and very responsible. (One Reference stated that there was a problem with a Superintendent on a project; and Limbaugh immediately replaced him with a very capable individual).

I have discussed Limbaugh with several

Vendors who typically quote water and sewerage projects. All stated that Limbaugh was an excellent contractor and very responsible in business dealings.

You can judge from Limbaugh's Resume that the firm is very substantial financially. (Note particularly the letter of June 27 from Mitchell Insurance concerning Limbaugh's bonding capacity.)

Schedule 2-A (24-in. Transmission Line):

Low Bid: Sch. 2-A: Key Co. Inc. of Arkansas

Pine Bluff, AR \$88,739.40

Low Bid: Sch. 2-B: Diamond Const. Co.

North Little Rock, AR \$235,556.77

Key Company is of known reputation to us. On May 20, 1986, a contract was awarded to them at Malvern for the installation of approx. 3,800 feet of 12-in. water main in the amount of \$65,420. We are the engineers for this project. I checked references on Key Company prior to award of this contract at Malvern; and found them to be well experienced and of good reputation as utility contractors. They have performed well on this project at Malvern; and the new water line has been completed and is being tested today. We would have no reservation in awarding a contract to Key Company if it is your decision to do so.

Diamond Construction Co. is a subsidiary of DANCO Const. Co. I am certain that DANCO is of known reputation to you personally. They are one of the largest utility contractors in the State, and have undertaken many of our projects in the past. (Their most recent project for you at Conway was the sanitary sewer extension to The Conway Center at a cost of approx. \$195,000.) We would have no reservations what so ever in awarding a contract for Sch. 2-B to Diamond Const. Co. if it is your decision to do so.

Summarily, we would recommend contract award to either of the low bidders on Schedules 2-A and 2-B; depending upon your ultimate decision concerning the route of the transmission line and the implications on the over-all project budget.

Engineers' Recommendation:

Schedule 1 (Water Plant): Reject the low bid for cause, and offer the contract to Limbaugh Construction Co. in the amount of \$3,952,000. If in the final analysis it is necessary to reduce the gross project budget, negotiate with Limbaugh for the removal of the sludge siphon system as discussed in conference with you and your staff on the afternoon of June 30th. (We estimate that \$200,000 or more can be saved by this deletion and not seriously disturb the overall performance of the plant. The sludge siphon

withdrawal system can be readily retrofitted at a later date.)

If you desire to implement the removal of the sludge siphon system from the contract with Limbaugh, we are prepared to negotiate with him such that a deductive Change Order can be implemented concurrently with the contract award.

Schedule 2 (Transmission Line): We would recommend contract award to either Key Company for Sch. 2-A, or to Diamond Construction Co. for Sch. 2-B. This decision rests with you dependent upon the functional advantages of either of the pipeline routes; and the implications on the overall project budget.

This has been an effort to concisely state our professional opinion regarding the award of the contracts for this Project. We will meet with you and your Board of Directors upon your invitation for further discussion and elaboration.

Sincerely yours,
CRIST ENGINEERS, INC.
BENNIE J. MCCOY, P.E.
President

CONWAY PUBLIC SCHOOLS

Office of the Superintendent

Conway, Arkansas 72032

June 30, 1986

Mr. James H. Brewer
Conway Corporation
Conway, Arkansas 72032

Dear Jim:

Our problem with Construction Engineers, Inc., as I recall the matter, had to be in the organization of the company. The company acted as a jobber for the sub-contractors in all work areas. The only people employed by CEI were the owners and a building foreman.

The contractor expected the building owner and the sub-contractors to work out any problems that arose. The school district had problems in getting the building finished. It seemed that everyone was involved in a law suit, everyone suing each other, including sub-contractors, contractor, school district, and architect.

Sincerely yours,
CARL STUART
Superintendent

ARKANSAS RULE OF CIVIL PROCEDURE 53

Masters

(c)(2) Effect. The court shall accept the master's findings of fact unless clearly erroneous. Within 20 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(c). The court after hearing may adopt the report or modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.